

IN THE HIGH COURT OF DELHI AT NEW DELHI

CM(M) No.543/2005

M/s.Packing Paper Sales (Regd.) & Anr. Petitioners
! through: Mr.Sunil Lalwani, Adv.

VERSUS

\$ Smt. Veena Lata Khosla Respondents
^ through: Mr.R.K.Jain, Adv.

RESERVED ON : 05.03.2007

% DATE OF DECISION: 15.03.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y
2. To be referred to the Reporter or not? Y
3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**

1. First petitioner is a partnership firm duly registered with the Registrar of Firms. Second petitioner is one of its registered partner. Petitioners had filed a suit for recovery against the respondents who are the wife and son respectively of late Shri O.S.Khosla.

2. I would be referring to the parties as plaintiffs and

defendants respectively.

3. A recovery suit was filed by the plaintiffs alleging that the defendants have inherited the estate of late Shri O.S.Khosla who took a loan in sum of Rs.25,000/- from the first plaintiff. Acknowledging the loan and agreeing to repay the same within 1 year together with interest @24% per annum, a writing was stated to have been executed by late Shri O.S.Khosla which reads as under:-

“I, O.S. Khosla s/o Late Shri V.N.Khosla r/o B-11/8262, Vasant Kunj, New Delhi hereby acknowledge that I have received a loan amount of Rs.25000/- from M/s. Packing Paper Sales, 2483, Chhipiwara Kalan, Chawri Bazar, Delhi-110006 through its partner Shri G.K.Jain through cheque bearing No.105229 drawn upon Allahabad Bank, Hauz Qazi Branch, Delhi-110 006.

I promise to pay back the loan amount to Shri G.K.Jain, partner of M/s.Packing Paper Sales, within one year from today i.e. 22.10.1991 within one year from 22.10.1991 along with interest @24% per annum.

Sd/-
(O.S.Khosla)”

4. That, loan was taken on 22.10.1991. Same was not repaid. On 6.6.1994, another acknowledgment with a promise to pay back the loan was stated to have been executed by late Shri O.S.Khosla. The acknowledgment coupled with a promise

to pay reads as under:-

“It is acknowledge be me today on 6.6.1994 that I O.S.Khosla son of Late Shri V.N.Khosla resident of B-11/8262, Vasant Kunj, New Delhi has taken a loan amount of Rs.25,000/- from M/s.Packing Paper Sales, 2483, Chhipiwar Kalan, Chawri Bazar, Delhi-110006 through its partner Shri G.K.Jain on interest @24% per annum.

And I promise to pay it back within six months. I will also pay the upto date interest.

Sd/-
(OM SARUP KHOSLA)”

5. Rs.2,000/- towards interest was paid by late Shri O.S.Khosla. Acknowledging the loan and promising to repay the same as also requesting to waive the interest, on 4.11.1996, late Shri O.S.Khosla was stated to have executed a writing which reads as under:-

“This is acknowledged today on 4.11.1996 by me that I O.S.Khosla son of Late Shri V.N.Khosla resident of B-11/8262, Vasant Kunj, New Delhi shall pay back the loan amount of Rs.25000/- (Rupees Twenty five thousand only) to M/s.Packing Paper Sales, 2483, Chhipiwara Kalan, Chawri Bazar, Delhi-110006 through its partner Shri G.K.Jain.

I have already paid the amount of Rs.2000/- (Rs.Two thousand only) in cash to Shri G.K.Jain towards the interest amount. I am very ill and I am unable to pay the interest. It is requested that interest amount may be forgone.

Sd/-
(OM SARUP KHOSLA)”

6. Stating that the defendants, being the wife and son respectively of late Shri O.S.Khosla inherited his estate, since principal i.e. Rs.25,000/- as also interest in sum of Rs.18,000/- from November 1996 to October 1999 was repayable, defendants were liable to repay the same.

7. So alleging, recovery suit was filed.

8. When witnesses of the plaintiff were being examined and the 3 afore noted writings stated to have been executed by late Shri O.S.Khosla were sought to be proved, an objection was raised to the admissibility of the documents alleging that the same were promissory notes and requisite stamp duty not having been paid or affixed thereon, the same were inadmissible in evidence.

9. Plea taken by the plaintiff was that being acknowledgments, documents were liable to be regularized by paying the requisite penalty as also the stamp duty, which was offered to be paid, hence plaintiffs stated that the documents should be treated as admissible in evidence and plaintiff be permitted to prove the same in accordance with law.

10. Vide order dated 15.1.2005, holding that the

documents were promissory notes which could not be made good in law by paying the deficient stamp duty because of proviso (a) to Section 35 of the Indian Stamp Act 1899, objection of the defendants was sustained. It was held that the documents could not be validated at all. Therefore, the same were held inadmissible in evidence.

11. Said order dated 15.1.2005 is under challenge.

12. It was conceded by learned counsel for the parties at the hearing held on 5.3.2007 that if the documents were promissory notes, requisite stamp duty not being paid, the same could not be validated in view of proviso (a) to Section 35 of the Indian Stamp Act 1899. However, counsel made submissions on the issue whether the 3 writings were promissory notes or not.

13. Needless to state, plaintiffs urged that the documents were not promissory notes. The defendants urged to the contrary.

14. Section 4 of the Negotiable Instruments Act 1881 defines a promissory note as under:-

“4. **“Promissory note”**. -A “promissory note” is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.”

15. Article 1 under Schedule 1 of the Indian Stamp Act

1899 reads as under:-

“1. ACKNOWLEDGMENT of a debt exceeding twenty rupees in amount or value, written or signed by, or on behalf of, a debtor in order to supply evidence of such, debt in any book (other than a bankers' pass-book) or on a separate piece of paper when such book or paper is left in the creditors' possession: provided that such acknowledgment does not contain any promise to pay the debt or any stipulation to pay interest or to deliver any goods or other property.

16. Sub section (22) of Section 2 of the Indian Stamp Act

1899 defines a promissory note as under:-

“(22) “Promissory note” means a promissory note as defined by the Negotiable Instruments Act, 1881 (26 of 1881);

It also includes a note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen;”

17. Whereas learned counsel for the defendants urged that Article 1 under Schedule 1 to the Indian Stamp Act 1899

clearly legislated that a document being an acknowledgment containing a promise to pay a debt or any stipulation to pay interest would not be an acknowledgment as stated in Article 1 of the Schedule 1 (due to the proviso to said article) and since the first document contained a promise to pay, the document stands excluded as an acknowledgment.

18. Counsel for the plaintiff urged that intention of the parties is the test to be applied and if intention was not to create a promissory note, notwithstanding the language of the document, the same had to be treated as an acknowledgment or a receipt or a promise to repay a loan.

19. Various authorities, as noted in the order impugned were cited by the learned counsel for the parties.

20. I need not note the various authorities which were cited inasmuch as all dealt with a particular document (being considered in the authority). Each document had a different language.

21. No document considered in the authorities is *pari materia* with the 3 documents with which I am concerned.

22. Section 13 of the Negotiable Instruments Act 1881

reads as under:-

“13. “Negotiable instrument”.- (1) A “negotiable instrument” means a promissory note, bill of exchange or cheque payable either to order or to bearer.

Explanation (i)- A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable.

Explanation (ii)- A promissory note, bill of exchange or cheque is payable to bearer which is expressed to be so payable or on which the only or last indorsement is an indorsement in blank.

Explanation (iii)- Where a promissory note, bill of exchange or cheque, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

(2) A negotiable instrument may be made payable to two or more payees jointly, or it may be payable in the alternative to one of two, or one or some of several payees.”

23. A perusal of Section 4 read with Section 13 of the Negotiable Instruments Act 1881 reveals that in order to be a promissory note, a document must conform to the following conditions:-

(a) it should be in writing,

- (b) it must contain an unconditional undertaking by the maker of the document,
- (c) such unconditional undertaking must be to pay certain sum of money to a certain person or to the order of that person or to the bearer of the instrument; and
- (d) the maker should sign it.

24. Explanation 1 to Section 13 of the Negotiable Instruments Act 1881 envisages that if the document conforms to the aforesaid conditions and if the document bears no words prohibiting transfer or indicating the intention that it will not be transferred, the document must be deemed to be negotiable. No specific form is noted, except that the document should be in such a form that it should be ordinarily acceptable by a man of commerce to be a promissory note, intended to be negotiable.

25. A comparison of the definition of a promissory note as defined vide sub-section 22 of Section 2 of the Indian Stamp Act 1899 and the definition of a promissory note as defined

under Section 4 of the Negotiable Instruments Act 1881 read with the definition of a negotiable instruments as defined in Section 13 of the Negotiable Instruments Act 1881 reveals that the definition of a promissory note in the Indian Stamp Act 1899, for the purposes of stamp duty, is wider than the definition of a promissory note under the Negotiable Instruments Act 1881, but it is only to the extent that in order to fall within the extended meaning, a document should be a promissory note in all respects except for the contingencies affecting the payment in the 2 cases envisaged in the proviso (to Article 1) in the ordinary mercantile sense.

26. The extended meaning only extends to a document (a) which includes a promise to pay the sum named out of particular funds, such amount may or may not be available with the fund or (b) where promise to pay a sum depends upon happening of condition or contingency which may or may not happen. When payment is not dependent upon any condition envisaged above, the inclusive definition does not become operative.

27. In the decision reported as AIR 1936 PC 171 Nawab.

Major Sir Mohammad Akbar Khan vs. Attar Singh, it was

observed as under:-

“If this document is otherwise within the definition of a promissory note, it would seem that it must be negotiable, for there appear to be no words prohibiting transfer, or indicating an intention that it should not be transferable.”

“Their Lordships prefer to decide this point on the broad ground that such a document as this is not, and could not be, intended to be brought within a definition relating to documents which are to be negotiable instruments. Such documents must come into existence for the purpose only of recording an agreement to pay money and nothing more, though, of course, they may state the consideration. Receipts and agreements generally are not intended to be negotiable, and serious embarrassment would be caused in commerce if the negotiable net were cast too wide. This document plainly is a receipt for money, containing the terms on which it is to be repaid. It is not without significance that the defendants who drew it, and who were experienced moneylenders, did not draw it on paper with an impressed stamp, as they would have had to if the document were a promissory note and that they affected a stamp which is sufficient if the document is a simple receipt. Being primarily a receipt, even if coupled with a promise to pay, it is not a promissory note.”

28. From the aforesaid decision, it is apparent that notwithstanding that a document contains a promise to pay but if it is primarily intended to be a receipt and not intended to be

negotiable in the ordinary mercantile sense, the document does not become a promissory note within the meaning of the Negotiable Instruments Act 1881.

29. In the said decision, affixation of a stamp sufficient for a receipt by men of business was taken to be a relevant consideration of great importance in gathering the intention of the parties.

30. Noting the decision in Akbar Khan's case, in the decision reported as AIR 1938 PC 121 Lala Karam Chand vs. Firm Mian Mir Ahmad Aziz Ahmad, considering a document which reads as under:-

“Received from you this 5th day of Asuj, 1986, Sambat corresponding to 20th September, 1929, a cheque for Rs.10,000/- drawn by you on Messrs. Grindlay & Co., Ltd., Peshawar. The amount would be repaid with interest thereon at the rate of Rs.11-4-0 p.c. Time ten months. The principal amount will be paid with interest after ten months from this date.”

it was held that the document was not a promissory note but a mere receipt.

31. As I read the law, to be labelled as a promissory note, not only must the document be negotiable and not only should it satisfy the 4 requirements referred to in para 23 above, the

document must pass 3 further tests, namely: (a) the promise to pay must be the substance of the instrument, (b) there must be nothing else inconsistent with the character of the document as substantially a promise to pay, and (c) the instrument must be intended by the parties to be a promissory note.

32. In order to find out whether a particular document is a promissory note or not, the intention of the parties at the time of execution of the document is to be looked into with reference to the substance of the document, the surrounding circumstances in which the document has been executed and its negotiability in the popular sense, whether the document was intended to be a promissory note or was intended to be a mere acknowledgment of a debt or receipt of consideration. This is a question of fact in each case and requires to be so interpreted and determined with reference to the backdrop facts constituting the transaction.

33. The first writing dated 22.10.1991 contains an acknowledgment of having received a loan in sum of Rs.25,000/-. No doubt, the latter part of the document contains a promise but records the same to be a promise to pay back

the loan. It records a rate of interest at which the loan was advanced.

34. The dominant intention of the document is to be receipt.

35. The second document executed on 6.6.1994 is an acknowledgment of the loan received under the document executed on 22.10.1991 coupled with an undertaking to repay the same.

36. The third document dated 4.11.1996 is an undertaking to repay the loan of Rs.25,000/-. It contains a request that the interest be waived.

37. I therefore hold in favour of the plaintiffs. The impugned order dated 15.1.2005 is set aside.

38. On paying the requisite stamp duty as also the penalty, the documents in question would be treated as admissible in evidence.

39. No costs.

March 15, 2007
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(PRADEEP NANDRAJOG)
JUDGE